TAKING THE MULLIGAN: THE LAND USE REGULATORY HURDLES IN GOLF COURSE REPURPOSING

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There are numerous obstacles facing developers attempting to repurpose a golf course. It can be politically controversial. Nearby residents often oppose the idea of replacing a low intensity, visually pleasing quasi-natural environment with a development that could bring in more people and more traffic. Golf courses are often viewed as open-space amenities, and homes abutting golf courses may be worth more than similar homes that don't. In an economic downturn, though, it can be expected that many public golf courses will close. When golf courses fail due to reduced play, or in regions suffering housing shortages, some type of redevelopment will have to be authorized; or else homeowner associations and/or conservation groups will have to raise enough money to purchase the course. Otherwise, the course will likely be abandoned, maintenance will cease, and the result will be bad for everyone involved.

Litigation is expensive. This can be an impediment for members of the public opposing golf course redevelopment. An alternative available to most homeowners is to convince their local governmental entities regulating golf course development or redevelopment to deny the redevelopment or impose conditions acceptable to area landowners.

Every jurisdiction has different statutes and ordinances regulating land use. While the politics in each jurisdiction is different, the legal process is fairly similar. Typically, the entitlement process for a new project will be as follows: comprehensive plan, zoning, platting, site improvements, building permit, and certificate of occupancy.[1]

Even our neighbors to the north are addressing golf course redevelopment challenges. The Meadowbrook Golf Course was developed in the 1930s and is located on the island of Montreal within the boundaries of both the City of Cote-St. Luc and the City of Montreal. In 2013, a developer submitted a request to build 1,500 housing units on the Borough of Lachine (Montreal) side of the island, but the bid was rejected by the Montreal City Council. According to news articles, the council claimed to reject the bid because of high infrastructure costs. As stated in a newspaper article, "it was not interested in covering the costs for a new road, bridge and water and sewage pipes into the development."[2]

In 2015, the land use and development plan for the island of Montreal was revised to re-designate a portion of the Meadowbrook Golf Course on the Lachine side from "residential" to "large green space or recreational."[3] The change was in response to petitioning from multiple conservationists, and the developer then filed a $44 million lawsuit against the City.

In 2017, a Superior Court judge rejected the developer's Lachine lawsuit on the grounds that the City's actions were not the proximate cause for the failed development attempt. The trial court judge pointed to the developer's need to finalize negotiations before development with the City, adjoining municipalities, Canadian Pacific, the suburban train authority, and Ministry of the Environment. Under the City's new land development plan, the landowner is still free to operate a golf course or other recreational facilities.[4]

The other side of the course, located in the City of Cote St-Luc, was designated recreational in 2000. The developer filed a regulatory takings lawsuit against the City of Cote St-Luc, which has been pending for years.[5] While the golf course could continue to operate under the new category, residential development would not be allowed.[6]

ZONING

We conducted a survey of the zoning statutes in the 50 states. It does not appear that any state legislature has imposed a specific statutory zoning requirement for golf course development or redevelopment. Virtually all U.S. municipalities of consequence have enacted general zoning ordinances that comply in some manner with the Standard Zoning Enabling Act (SZEA). The Act was drafted by a committee of the U.S. Department of Commerce and first issued in 1922.[7] The SZEA was initially adopted by all 50 states and is still in effect, in modified form, in most states.

The SZEA authorizes a local governing body to regulate the following:

- Height, number of stories, and size of buildings and other structures;
- Percentage of lot that may be occupied;
- Size of yards, courts, and other open spaces;
- Population density;
- Location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and
- In designed places and areas of historical, cultural, or architectural importance and significance, the governing body may regulate construction, reconstruction, alteration, and razing of buildings and structures.[8]

COMPREHENSIVE PLANS

Under the SZEA, local governments should enact zoning ordinances "in accordance with a comprehensive plan."[9] While not expressly defined, it is commonly referred to as an independent long-term plan regulating the future development of land.[10] Comprehensive plans constitute "the general outline of projected development," while zoning is a regulatory tool designed to implement the plan.[11]

The significance of zoning compliance with a local comprehensive plan for golf course development or redevelopment depends largely upon the state where the property is located. For example, Texas allows, but does not require, the governing body of a municipality to adopt a comprehensive plan.[12] The contents of the comprehensive plan are left to the local entity, and a map showing future land uses must expressly state that a comprehensive plan does not establish zoning district boundaries.[13]

Many states located on the East and West Coasts require that development ordinances be consistent with a comprehensive plan similar to the constitution.[14] This compliance theory is reinforced by appellate opinions in those states.[15]

For example, the State of Washington's Growth Management Act (GMA) is a series of state statutes that requires fast-growing cities and counties to develop a comprehensive plan to manage their population growth.[16] The GMA establishes the primacy of the comprehensive plan which must contain the following elements: land use, housing, capital facilities plan, utilities, transportation, economic development, and parks and recreation.[17] Optional plan elements include conservation, solar energy, recreation, and sub-area plans.[18]

In California, the comprehensive plan is called a general plan and is governed by state statute.[19] Each

general plan must include the vision, goals, and objectives of the city or county in terms of planning and development within eight different "elements" defined by the state:

1. Land use;
2. Housing;
3. Transportation;
4. Conservation;
5. Noise;
6. Safety;
7. Open space; and
8. Environmental justice.[20]

Cities have discretion to add elements but can be penalized if their general plan does not adequately address the eight state-mandated elements.[21] Local government planning in Florida has been guided over the last 25 years by the 1985 Growth Management Act.[22] It requires that every local government adopt a comprehensive plan that addresses future land use, housing, transportation, infrastructure, conservation, recreation and open space, intergovernmental coordination and capital improvements.[23] Virginia has similar comprehensive plan requirements.[24]

The greater the consistency between the comprehensive plan's land use designation and the proposed new use of the golf course property, the smoother the path to obtaining the necessary development approvals. Conversely, a large difference between the proposed use and the comprehensive plan usually makes it extremely difficult to navigate local regulatory hurdles.

ZONING DISTRICTS

There are many different types of zoning, including Euclidean, performance, and incentive zoning. Understanding the base zone on a golf course property impacts the repurposing strategy. While every local land use regulatory entity has a different protocol, the options for golf course property can typically be broken down as follows:

- No zoning;
- Planned development;
- Specific use permit;
- Overlay district;
- Straight golf course district; and
- Straight district zoning.

1. No zoning option

There are few jurisdictions within the United States where there is no zoning authority. For example, Texas authorizes cities to regulate land use within their boundaries. For land located outside of a corporate limit, zoning does not apply because Texas counties do not have the required statutory authority. However, counties in many states have zoning authority on land outside the city limits.[25] The City of Houston is the largest city in the United States without zoning, but much of the land within the city limits is subject to deed restrictions. Those restrictions can be enforced by the City per statute.[26] For those local jurisdictions without zoning authority, golf course land can be either developed or redeveloped as a matter of right from a land use perspective.

2. Planned development district

A planned development district (PD) or planned unit district is a unique zoning district imposed by separate ordinance to allow a specific project on a particular tract of land. The PD is initiated by the developer and usually includes a site plan and written conditions included in the PD ordinance.[27] No land uses are authorized except for those stated in the PD ordinance. Adoption or rejection of a PD ordinance is typically construed to be a legislative act.[28] Because of the unique nature of golf course developments, they lend themselves to PD zoning.

Many large mixed-use developments with golf course components are zoned PD. A recent example is Paso Robles which is a 1,338 acre development approved by the City of San Marcos, Texas.[29] The zoning classification authorizes a mixture of commercial and residential uses, along with a 310-acre

golf course and open-space area. In addition to describing the golf course in the text of the PD ordinance, the conceptual land use and open-space plans clearly show the golf course holes, fairways, and greens. According to the PD ordinance, treated effluent will be used for golf course irrigation.[30] The ordinance requires that the golf course operation must comply with the standards of the Audubon International Signature Program which requires adhering to an environmental plan.[31] In addition, the PD ordinance states that if the golf course closes, the land shall revert to open space. Older PD ordinances are often silent as to what happens if the golf course closes.

3. Specific use permits

Many golf courses are allowed by specific or special use permit (SUP) or conditional use permit. An SUP is a type of overlay on a straight zoning district and is sometimes referred to as a conditional use permit. The use is not allowed as a matter of right but must be approved as a separate permit. Similar to a PD, a SUP ordinance will typically include a site plan and specific conditions. However, the underlying development regulations in the base zoning district in the comprehensive zoning ordinance apply. For example, the setbacks, height, and density standards cannot be varied by SUP unless they are made more restrictive. Increases in density and development rights can only be varied in a PD.

For example, the City of Omaha, Nebraska, allows golf course uses under the category of "Outdoor Sports and Recreation." This use is allowed by special use permit in residential zoning districts.[32] In one instance, a developer proposed using a small portion of the Shadow Ridge Country Club property for 28 residential lots where million-dollar houses would be built (the golf course would remain).[33] The redevelopment of that area required some changes to the driving range that necessitated amendment of the special use permit for the golf course. Nearby residents opposed the amendment to the special use permit as a protest to the development of residential lots, but the Omaha City Council eventually approved the rezoning.

In the City of Escondido, California, golf courses are allowed by major conditional use permit in six of the eight total residential zoning districts listed in the city's zoning ordinance (the exceptions being the highest-density multifamily districts).[34] A major conditional use permit requires the approval of the city planning commission, which the commission may grant or deny in its discretion.[35] The denial of a conditional use permit by the planning commission may be appealed to the city council.[36] Decisions granting or denying a conditional use permit must be based upon the following guidelines:

- Sound principles of land use and in response to services required by the community;
- Whether the use will cause deterioration of bordering land uses or create a special problem for the area in which it is located; and
- Consideration of the effect of the proposed land use on the community or neighborhood plan for the area in which it is to be located.[37]

For property to be entitled for a golf course use other than by conditional use permit, the property must be rezoned, which requires the approval of the city council after a recommendation by the planning commission.[38]

In residential districts in the City of Scottsdale, Arizona, a golf course is permitted only by a conditional use permit.[39] The conditional use permit is discretionary and requires approval of both the planning commission and the city council.[40] Instead of a "golf course district," Scottsdale has an Open Space (OS) district where a golf course use is authorized. The OS district "is intended to provide for land uses in areas generally subject to periodic inundation. It is further intended to provide for land uses in areas which have been set aside to serve recreational functions or to provide open space areas."[41]

Because both PD and SUP ordinances typically include site plans illustrating the physical development of the property, these types of zoning ordinances can bolster the arguments of either side in a redevelopment situation. For example, if the ordinance and site plan address solely the golf course

component, then adjoining residents have a weaker argument that they relied on the golf course when they purchased their property. If the site plan shows the golf course as part of a larger master planned community that includes houses along fairways and greens, then adjoining landowners have stronger common law and political arguments objecting to the repurposed project.

4. Golf course districts

According to the SZEA, jurisdictions are supposed to be divided into zoning districts. The zoning standards for the particular district are to be uniform according to section 211.005(b) of the Texas Local Government Code. For example, each tract zoned in different parts of a city as a C-Commercial District will have the same height, density, and setback restrictions. Some cities have created a golf course zoning district which only allows a golf course use.

The Town Council of the Town of Brookhaven, New York approved a change of zoning for Rock Hill Golf and Country Club from a residential zoning district to the Golf Course District (GCD).[42] According to local news articles, Rock Hill was the first private course to join the newly created GCD.[43] The news articles stated that the town created the GCD to protect against residential or commercial redevelopment of golf courses in the town.[44] Other area golf courses had been redeveloped into an apartment project, single-family housing development and a solar farm.[45] The GCD was created to slow down or prevent more golf course redevelopment.

Rezoning added a hurdle to the redevelopment process because in order to redevelop the property for a use other than a golf course, a developer would have to seek a rezoning from the town. One article quoted the councilmember that sponsored the creation of the golf course district who said that "[s]ingle-family housing will no longer be allowed to be developed on the Mill Pond course in Medford and Rolling Oaks in Rocky Point...[i]t's a very positive step in the right direction for residents and the Town of Brookhaven" and "will allow enhancements such as spas, restaurants and catering halls."[46]

Following the proposed sale of the Bent Creek Golf Course to a residential developer in 2006, the City of Eden Prairie, Minnesota, added a GCD that severely limited the permitted uses in that district to ensure the continued open space and recreational nature of golf course land.[47] The stated purpose of that district is to "specify a land use district applicable and consistent with the historical and contractual development and use of the City's golf courses."[48] That district limits the permitted uses only to golf courses and similar recreational uses.[49] The redevelopment of Bent Creek was met with opposition from the surrounding homeowners who claimed the course was required to remain as open space pursuant to agreements dating back to the initial development of the course.[50] Following the establishment of the GCD in the comprehensive zoning ordinance, the City surrendered to neighborhood opposition and rezoned Bent Creek to a GCD.

The Town of Brookhaven, New York created a separate GCD as part of its zoning regulations.[51] The only permitted main uses in the GCD are (i) golf courses, public or private; and (ii) country clubs.[52] A detailed list of allowed accessory uses incidental to a golf course or country club is provided, including a bar, catering hall, clubhouse, golf driving range, game room, health club, maintenance facilities, residential watchman's quarters, physical therapy facility, miniature golf, personal service spa, a "[m]ajor restaurant with no drive-through restaurant, take-out restaurant, snack bar, outside seating, and may include indoor or outdoor live music, entertainment, and dancing."[53]

Similarly, in Hot Springs, South Dakota, the existing municipal golf course is allowed by right in the golf course zoning district.[54] Otherwise, golf courses are "permitted on review" in the residential "A" and residential "B" (medium to high density residential) zoning districts.[55] Consent from the city's common council is required to authorize a use permitted on review, which the council may grant or deny in its discretion.[56] In consideration of an application for a use permitted on review, the council may consider:

- Conformance with the goals and policies of the comprehensive plan;
- Compatibility with existing and potential permitted uses in proximity to the proposed use;
- Public safety issues relating to projected traffic generated by the proposed use;
- Community benefit of the proposed use;
- Aesthetic considerations related to the scope and size of the proposed use; and
- Adequacy of public services for the proposed use.[57]

To change the zoning of property, a public hearing is required before the planning and zoning commission which makes a recommendation prior to a hearing before the city council which is the final approving authority.[58]

5. Straight or base zoning districts

In many cities, a golf course use is authorized as a matter of right in all districts included in the comprehensive zoning ordinance. Most jurisdictions view golf courses as beneficial, or, at the worst, neutral uses. They serve as open-space and aesthetic buffers and generate few adverse externalities. Many cities have golf course use definitions in their comprehensive zoning ordinances. For example, the City of The Colony, Texas, defines a golf course as "a tract of land laid out with at least nine holes, except for miniature golf, for playing a game of golf and improved with tees, greens, fairways, and hazards."[59] A golf course includes a clubhouse, shelters, and other accessory uses.

In Cobb County, Georgia, golf courses are permitted by right in almost all residential and commercial zoning districts.[60] The county's zoning regulations have an entire section of supplemental regulations for golf courses.[61] There are different regulations depending on the type of golf course. The regulations differentiate between a par three golf course, public or semipublic golf course, private golf course, executive golf course, and a regulation public nine-hole course. For example, a private golf course must be a minimum of 15 acres, a minimum of 5,500 yards, and all buildings or driving ranges must be set back 50 feet from future public roadways or 75 feet from property lines. Safety netting of at least 32 feet in height is required abutting any public road. Permitted accessory uses include maintenance buildings, professional teaching and lessons, golf rentals, pro shop, tennis courts (requires two acres in addition to golf course acreage), swimming pool (one extra acre required), and driving range (eight extra acres required).

Relatively intense zoning districts can contain a golf course, single-family, office, and commercial and/or industrial uses as a matter of right. A developer looking to repurpose for a use allowed as a matter of right in the base zoning district should not face any rezoning hurdles. If the underlying zoning district does not allow the more intense use, then approval of a rezoning application would be necessary.

6. Multiple zoning districts

Because golf courses often contain more than 100 acres of land, there may be numerous base zoning districts on various parts of the course. In order to redevelop the entirety of a closed course, it will probably be necessary to rezone the property to a single district. Depending upon the locations of the respective zoning districts, and the development standards in those districts, it might be possible to develop within certain districts shown on the golf course property without requiring a zoning change.

7. Overlay districts

The City of Austin, Texas provides for a conditional overlay (CO) combining district. The CO overlay is used in conjunction with the city's base zoning districts. Similar to a SUP, the purpose of the CO overlay is "to modify use and site development regulations to address the specific circumstances presented by a site." Thus, the CO overlay is designed to be site-specific. The city's Land Development Code provides that "[a] CO combining district may be used to: (1) promote compatibility between competing or potentially incompatible uses; (2) ease the transition from one base district to another; (3) address land uses or sites with special requirements; and (4)

guide development in unique circumstances."[62] The conditional overlay district is used many times as a tool to prohibit certain uses that would otherwise be allowed in the base zoning district.

REZONING

Developers seeking to redevelop golf course land need to understand the underlying zoning standards and how they can affect the proposed new use. If the base zoning authorizes the new use as a matter of right, then a rezoning will not be required.

Potential commercial and residential developers of closed golf courses will often face daunting political and legal challenges to rezone the land to the new use. Elected officials will usually be more sensitive to the concerns of area residents (i.e. voters) than the monetary success of a potential developer.

In order to repurpose land that does not have broad underlying zoning for a use other than a golf course, a rezoning application must be submitted and approved by the appropriate governing body. Section 5 of the SZEA establishes the procedure for rezoning land, and this procedure has been adopted by most states. Public hearings are required before the zoning commission and the governing body. Notice is published in the newspaper and mailed to nearby landowners prior to the planning and zoning commission hearing.[63] It requires that written notice of a proposed change be sent to landowners located within a specified distance from the property being rezoned. If owners of 20 percent or more of the land within the notice area submit written protests to the rezoning, then a supermajority vote of the governing body is triggered.

If the zoning on the closed golf course property must be amended to allow a proposed redevelopment, the nearby residents and the relevant municipality have significant leverage. There will be notice of the change, public hearings, and a possible three-fourths vote of the city council, required to change the zoning. While local governments are not supposed to act arbitrarily or capriciously, legislative enactments are presumed to be valid by the courts. Zoning applications are subject to the legislative, discretionary decisions of the city council. For over 90 years, courts have established a strong, almost irrefutable presumption of validity for legislative zoning decisions.[64] If issuable facts support a zoning vote, the court is not to submit the matter to a jury, but instead to uphold the ordinance as a matter of law.[65]

Many times a developer will test the potential waters before deciding to file a rezoning application. Preparing the necessary studies and hiring land use attorneys and other consultants to facilitate the zoning process can be costly and time-consuming. If there is significant local opposition then the developer may decide to focus his or her resources elsewhere rather than pursue a lost cause. Regardless, each locality and golf course redevelopment will be unique, resulting in different outcomes depending upon the unique circumstances.

For example, in the City of San Antonio, Texas, the city council approved the rezoning of the defunct Pecan Valley Golf Club.[66] The approved plan for the 215-acre site includes a nine-hole championship golf course; market-rate multifamily and single-family housing; health, fitness, and sports facilities; entertainment and retail, and a bike trail. All amenities are proposed to be open to the public but the project is primarily designed to assist military veterans' transition to civilian life.[67] San Antonio is home to several military bases and numerous active and retired veterans. Opponents of the project voiced concerns regarding flooding, crime, and overall population and traffic congestion.[68] The developer ultimately agreed to include single-family uses, placed a cap on multifamily units, and restricted public access to the local neighborhoods.[69]

In Edmond, Oklahoma, the city council denied a request to amend an area plan to allow mixed-use development including office, retail, multifamily, and single-family development on the closed Heritage at Coffee Creek golf course.[70] The course peaked at 46,000 rounds per year in 1996 but only averaged 30,000 rounds per year in 2016. The city planning commission previously recommended approval of

the request. Existing zoning of the property allowed for single-family development. Accordingly, after the denial of the zoning request, the developer intended to file a subdivision plat for single-family lots rather than the more dense mixed-use development proposed in his request. The neighboring homeowner's association expressed heavy opposition both to the original request and to the proposed alternative single-family development. The HOA recently filed a lawsuit in state court arguing it has an implied easement to use the property as a golf course since the golf course is intrinsically linked to the neighborhood and was included in both marketing materials and on the original plat when they purchased properties.

In Cuyahoga Falls, Ohio, the city council approved a request to rezone the Sycamore Valley Golf Course from an E-1 employment district to an R-3 suburban density residential district to allow the development of 148 townhomes.[71] The council approved the request over substantial opposition from area residents who raised concerns regarding flooding and traffic. One councilmember stated that he voted to approve the request on the basis that the amended zoning provided more protections against flooding and traffic by including trails and less impervious coverage than what was allowed under existing zoning.

In one instance, a city refused to even take action on a zoning request to permit redevelopment of a golf course.[72] In Wake Forest, North Carolina, the golf course at issue closed in 2007 and the owners submitted an application for a modification to its zoning to allow residential use. The development plan attached to the PUD zoning was approved in 1999 for the club, and designated the entire course as open space. But the city's board of commissioners elected not to conduct a public hearing or otherwise consider the application. Following the filing of litigation, the court upheld the city's refusal to call a hearing on the basis that the owners had voluntarily designated the golf course as open space during the 1999 zoning and thus were estopped from complaining about the voluntary open space designation placed on the property.[73]

Another way in which some cities have handled golf course redevelopment includes acquiring the course for city or public purposes. For example, in 2008, after years of financial struggle, the owners of the Woodland Creek Golf Course, located in Andover, Minnesota, pursued a zoning change that would have permitted residential development of the course.[74] The surrounding residents opposed the rezoning, and the City of Andover refused to approve the request. The course was subsequently closed. Several years later, in 2013, the city purchased the golf course and in 2015 voted to establish a conservation easement over the course to preserve open space.[75]

In the City of Escondido, California, a conflict arose between a landowner proposing to redevelop the golf course portion of a country club and the existing homeowners along the golf course.[76] Because country club memberships had dwindled, the owner proposed to re-develop the property with hundreds of homes.[77] Local residents opposed the plan, arguing that the golf course was a negotiated portion of the master-planned community.[78] In response to neighborhood opposition, the city council downzoned the golf course to open space.[79] The owner filed suit alleging an unconstitutional taking and prevailed.[80] Ultimately, the city approved a plan for the 109-acre site including 380 single-family dwelling units with a minimum lot size of 7,000 square feet, "clustered" development to preserve open space, and a clubhouse area with recreational, social, and farm amenities.[81]

In Horry County, South Carolina, the county council delayed a vote on whether to approve the rezoning of the Indian Wells Golf Course property to allow 520 single-family homes.[82] Existing zoning allowed for single-family housing to be developed on the property, but the request allowed for increased density and some businesses. The original zoning request included a combination of single-family, townhomes, and some commercial development. The zoning request was recommended for denial by the county plan commission. The request was subsequently revised. Neighboring residents strongly opposed the original and revised requests due to

concerns of insufficient storm water infrastructure to support the development, loss of open space, and a preference for 55-years-and-older age-restricted housing. The county planning commission recommended approval of the new zoning plan.

In Richland County, South Carolina, the county council delayed a vote on a request to change the zoning of the closed and bankrupt Golf Club of South Carolina at Crickentree from Traditional Residential Open Spaces (TROS) zoning to Medium Density Residential (RD-MS) to allow 450 single-family homes to be developed.[83] The county planning commission recommended denial of the request even though the county planning staff recommended approval of the zoning request on the basis that it complied with the County Comprehensive Land Use Plan. The mayor of a neighboring city proposed a plan for the county to purchase the property to maintain it as open space and recreational fields. Nearby homeowners expressed fears that the rezoning would decrease their property values and create additional traffic.

As these examples illustrate, there are numerous legal and political factors that have important effects on the rezoning process. Even after zoning is established allowing the repurposed use, local regulatory authorities will require additional land use approvals.

PLATTING

There are instances in which a closed golf course can be redeveloped without being rezoned because the new use is authorized under the existing zoning. The legal (if not political) leverage then turns in favor of the developer because plat and building permit approval is supposed to be nondiscretionary and ministerial in most localities.

The next step in the development process after zoning typically is to plat the property. Two years after the SZEA was drafted, the department of commerce finalized the Standard City Planning Act (SCPA). Title II of the Act sets forth the regulatory process for approving land subdivisions. Local governments were supposed to enact subdivision regulations and establish standards for plat submittals. It appears that all 50 states have statutes of some type regulating the subdivision and platting of land. Platting is based on the state's land registration system and is also used to implement a city's comprehensive plan. The planning commission is typically designated as the subdivision control agency.[84] Subdivision ordinances or regulations are initially adopted and they specify the standards for infrastructure related to a new development. Most states have a deadline by which a plat must be reviewed and either approved or denied.[85] The subdivision ordinance provides for the dedication of streets, utilities, and parks.[86]

A city's discretion to approve or deny a plat is much more limited than a zoning request.[87] When the plat applicant "has done all that the statutes and law demands," the approval of the plat "becomes a mere ministerial duty.…"[88]

Even if the proposed land use is allowed under the municipality's zoning ordinance, the technical engineering standards contained in the subdivision regulations or other development ordinances may be applied to defeat a proposed golf course repurposing. Engineering criteria are sometimes interpreted or manipulated in different ways to achieve a desired result. Virtually every reuse will have considerably greater effects on nearby infrastructure than the golf course use.

Because a governmental agency cannot legally deny a plat application that meets all of the ordinance requirements for infrastructure, it is rare that a redevelopment proposal will be denied at the plat stage. However, some jurisdictions have land use regulations that can affect golf course redevelopment in addition to platting requirements.

Such an administrative procedure was recently addressed in Delaware.[89] In the late 1930's Hercules Powder Company constructed a golf course for its employees on a site located near Route 48 (Lancaster Pike) outside of Wilmington. Hercules eventually divested itself of the golf course, which continued to be operated under the name "Delaware National Country Club." After the closure of the course in

2010, Toll Brothers made plans to build homes on the site of the former golf course, calling the proposed development "Delaware National."

New Castle County's scheme for regulating development is based on the concept of concurrency. In general terms, "concurrency" means that infrastructure necessary to support the proposed development must already exist or will exist by the time the development is completed. The idea is to prevent the need for new infrastructure from outstripping the government's ability to provide it.

In this case Toll Brothers' plans hit a snag with respect to projected traffic impacts from 263 new single-family houses. The County's Unified Development Code requires that the applicant's traffic impact study (TIS) be provided to the Delaware Department of Transportation (DelDOT) for review. The primary metric for measuring impact is the level of service of intersections within the area of influence in the proposed development.

One of the affected intersections graded at a LOS (Level of Service) "F." While Toll Brothers offered to pay $1.1 million to improve the intersection to an acceptable level of service, DelDOT proffered a different mitigation plan at a cost of $3.5 million. Regardless, DelDOT advised the County that it had no objection to Toll Brothers' recordation of the site plan.

Despite the DelDOT recommendation, the County's Department of Land Use disapproved the TIS because the subject intersection remained at LOS F. As a result of the disapproval, Toll Brothers' plan expired. Following Toll Brothers' appeal the county's Board of Adjustment upheld the Department's ruling. The Superior Court of Delaware upheld the county's denial.

GOLF COURSE PLATTING STATUTES

After reviewing the subdivision statutes of the 50 states, we could find only one that specifically and expressly addresses the replatting of golf course land. Chapter 212 of the Texas Local Government Code is the platting enabling statute, and section 212.0155 addresses a golf course redevelopment. It places significant substantive and procedural hurdles to replat a "subdivision golf course" to a new use.

If the new use triggers the applicability of the statute, it likely becomes very difficult to overcome significant political opposition. The typical nondiscretionary, ministerial platting process then morphs into a legislative discretionary process similar to zoning. For example, a city council is not authorized to approve the section 212.0155 replat until it makes several findings, including that the development of the golf course will not have a "materially adverse effect" on the "health, safety or general welfare" or the "safe, orderly and healthful development of the municipality." These vague and ambiguous requirements are so broad that the City could deny a golf course subdivision replat for virtually any reason.

In addition, the governing body is required to find that the proposed development "will not have a materially adverse effect on existing single-family property values." The neighbors will obviously claim an adverse effect and the temptation will be for the City to deny the replat for political reasons. Because there is no 30-day timeframe for the City to act on or to approve the section 212.0155 replat, the developer might never obtain the necessary governmental approvals to develop the property.

For the developer of a closed golf course, it is therefore imperative to avoid any categorization as a "subdivision golf course." A case example of the statute's applicability is the former Great Southwest Golf Course, in Grand Prairie, Texas. This property is a long-driver and three-wood distance from AT&T Cowboys Stadium, Texas Rangers Ballpark, and Six Flags over Texas.

Land in the vicinity of the golf course had been zoned "industrial" since the early 1960s. Golf courses were allowed as a matter of right in the industrial district. A final plat was approved by the city in 1965 for the Great Southwest Industrial Park showing a platted lot for the golf course. The plat did not show any residential development, and the golf course

was developed in 1968. When the golf course was developed there was no land in the immediate area that was zoned and/or platted for single-family residential development.

Subsequent to the golf course's construction, several tracts adjacent to the golf course were zoned and platted for residential use by other developers. Most of these tracts were then developed and used for multi-family uses. Approximately 7.5 adjacent acres was platted and developed in the late 1970s for 53 single-family homes.

As the golf course was about to close, an industrial developer approached the owner about purchasing the tract for several warehouse buildings. After receiving initial indications of support from city staff, the developer submitted a plat application and a site plan application for that portion of the property located within the city's SH 161 overlay district. Soon after the applications were filed, significant political opposition erupted. As luck would have it, the city's recently retired mayor lived adjacent to the course.

In the written reports to the planning commission, city staff recommended approval of the applications with conditions. The commission, however, voted to postpone taking any action on the applications for an indefinite timeframe until the developer submitted documentation to the city in accordance with section 212.0155 of the Texas Local Government Code.

In response, the developer sent to the city a formal request for a certificate stating the date the plat was filed and that the Commission failed to act on the plat application within the statutory 30-day time period. The city refused to issue the certificate and a lawsuit was filed.[90] A key legal issue in this case was the applicability of the relevant facts to the language in section 212.0155 of the Texas Local Government Code. According to section 212.0155(c), "a new plat must conform to the requirements of this section if any of the area subject to the new plat is a subdivision golf course." A subdivision golf course is defined as land "that was originally developed as a golf course or a country club within a common scheme of development for a predominantly residential single-family development project." A new plat must conform to the section 212.0155 requirements if any of the area subject to the new plat is a subdivision golf course. The question in this case was whether the course was "originally developed within a common scheme of development for a predominantly residential single-family development project" according to the plain meaning of these words.

The term "common scheme or plan" means a common design.[91] The term "single-family" means one residential unit on a platted lot.[92] The legislative language has not been the subject of a reported court of appeal opinion. However, the language includes some of the components of the implied reciprocal negative easement doctrine in common law:

> [W]here a common grantor develops a tract of land for sale in lots and pursues a course of conduct which indicates that he intends to inaugurate a general *scheme* or *plan* of development for the benefit of himself and the purchasers of the various lots, and by numerous conveyances inserts in the deeds substantially uniform restrictions, conditions and covenants against the use of the property, the grantees acquire by implication an equitable right, variously referred to as an implied reciprocal negative easement or an equitable servitude, to enforce similar restrictions against that part of the tract retained by the grantor or subsequently sold without the restrictions to a purchaser with actual or constructive notice of the restrictions and covenants[93] (emphasis added).

In this case, the property was platted and developed as a golf course in the mid-1960's (completed in 1965) with no residential development in the area. The 1965 golf plat contained no residential, much less single-family, development. All of the surrounding land area was zoned industrial at that time and required rezoning for even the multifamily uses which were developed years after the completion of the golf course.

There were several factors indicating that Great Southwest should not be defined as a subdivision golf course. For example, if the original developer of the golf course had truly intended to develop a golf course as part of a predominantly single-family residential development, the developer would have taken steps to rezone the adjacent new residential pods prior to commencing construction of the golf course. For example, he could have applied for a planned development district for a master planned community which could have included both golf course and residential uses within a PD district.[94]

Another significant factor is that development of each of these tracts for residential purposes required a rezoning to a residential district. If the developer of the golf course had intended for this development to contain a "predominantly residential single-family development project" he would have requested the city to rezone and plat these parcels for single-family residential purposes prior to or commensurate with developing the golf course.

Finally, the only relevant residential pod developed and currently used for single-family development is the seven acre Fairway Park townhome project. Fairway Park's percentage of the golf course and residential acreage is four percent. By any metric, the small single-family component in Fairway Park did not make this a "predominant single-family residential development."

After the trial court judge ruled in favor of the developer that the statutory requirements had not been triggered, the parties entered into settlement discussions. A compromise and settlement agreement was subsequently approved whereby the developer agreed to reduce the size and move buildings closest to the townhouse neighborhood. Title to the floodplain area on the southern portion of the course was conveyed to the City. In addition, a portion of the course adjacent to the townhome community was conveyed to the homeowners association. The developer also agreed to construct a four-foot landscaping berm to screen the view of the new buildings from the residents. Following the execution of the settlement agreement, the lawsuit was dismissed by a trial court judgment that approved the developer's site plan and plat application.

CONCLUSION

Redevelopment of golf course land faces numerous political and legal challenges. Before a developer buys a golf course tract for redevelopment, it is critical that the deed records be scrutinized and marketing materials obtained to address any legal claims that nearby residents may utilize to prevent the redevelopment. In addition to understanding the base zoning and the local regulatory hurdles to repurposing, the political and legal climate should be analyzed. The developer can then conduct his or her risk analysis (with the assistance of a competent land use attorney, of course) to determine whether to pursue what will likely be a controversial and lengthy approval process.

Notes

1 There are many other land use regulatory issues that are not covered in this article. They include floodplain regulations, environmental oversight (e.g. development of closed landfills as golf courses), conveyance of publicly owned golf courses, etc.

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9 Larsen & Siemon, 1 E. Yokley, Zoning Law and Practice § 1-4 (4th ed. 1978).

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11 Charles M. Haar, "In Accordance with a Comprehensive Plan", 68 Harv. L. Rev. 1154, 1156 (1955).

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17 Wash. Rev. Code Ann. § 36.70A.070.

18 Wash. Rev. Code Ann. § 36.70A.080.

19 Cal. Gov. Code § 65040.2.

20 Cal Gov. Code § 65302.

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22 Florida Statutes Ch. 163.

23 Fla. Administrative Code 9J-5.

24 Va. Code Ann. Ch. 22 § 15.2-2223.

25 See Chapter 23, Nebraska Revised Civil Statutes; Chapter 278, Nevada Revised Civil Statutes as examples.

26 Tex. Local Gov't Code § 212.151, et seq., 125 San Jose California Code of Ordinance, Ch. 20.70.

27 San Jose California Code of Ordinance, Ch. 20.70.

28 Wheatland v. City of San Marcos, 157 S.W.3d 473 (Tex. App.—Austin 2004, pet. den.); Calhoun v. St. Bernard Parish, 937 F.2d 172 (5th Cir. 1991), cert. denied, 502 U.S. 1060 (1992).

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38 Sec. § 33-1260, Escondido City Code.

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41 Id., Art. VI.

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